

ORIGINAL

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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DEC 17 1996

Federal Communications Commission
Office of Secretary

In re Applications of)	MM Docket No. 93-75
)	
TRINITY BROADCASTING OF)	
FLORIDA, INC.)	BRCT-911001LY
)	
For Renewal of License of)	
Television Station WHFT(TV))	
Miami, Florida)	
)	
GLENDAL E BROADCASTING)	
COMPANY)	BPCT-911227KE
)	
For Construction Permit for)	
New Television Station in)	
Miami, Florida)	DOCKET FILE COPY ORIGINAL

To: The Commission

OPPOSITION BY GLENDAL E BROADCASTING COMPANY
TO COMMENTS ON BEHALF OF WOULD-BE INTERVENOR

Gene A. Bechtel

Bechtel & Cole, Chartered
Suite 250, 1901 L Street, N.W.
Washington, D.C. 20036
Telephone 202-833-4190
Telecopier 202-833-3084

Counsel for Glendale
Broadcasting Company

December 17, 1996

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To: The Commission

OPPOSITION BY GLENDALE BROADCASTING COMPANY
TO COMMENTS ON BEHALF OF WOULD-BE INTERVENOR

1. The comments filed November 15, 1996 on behalf of counsel for Trinity-NMTV¹, who seeks intervenor status in this matter, are the sixth effort to present the same arguments which have previously been rejected by the Commission and Judge Chachkin. They are wildly-redundant and a frivolous imposition on the Commission's processes.²

I.
Summary

2. Counsel for Trinity-NMTV made no real effort to study the relevant law before giving advice that NMTV was entitled to

¹ "Trinity" refers to Trinity Broadcasting Network/Trinity Broadcasting of Florida, Inc. and "NMTV" refers to National Minority TV, Inc., formerly Translator TV, Inc.

² Previously: (a) Opposition to petition to deny (1991), (b) request for declaratory ruling (1992), (c) proposed findings and conclusions (1994), (d) exceptions to the Initial Decision of Judge Chachkin (1995) and (e) motion to vacate record, etc. (1996).

minority preferences and preferences for not having any other broadcast interests notwithstanding the control and dominance of NMTV by Trinity and Mr. Crouch.

3. Mr. Crouch was aware that a complete presentation of all of the facts and circumstances should be made to the Commission to obtain a declaratory ruling. The facts and circumstances of domination and control by Mr. Crouch and Trinity over NMTV were not disclosed to the Commission.

4. The de facto control laws, which have been in existence since 1927, in the form of a regulation that has been on the books since 1940, are applicable to the domination of NMTV by Mr. Crouch and Trinity, requiring the ultimate penalty of denial of license.

5. Even if the matter is viewed solely as "ownership" in the form of NMTV board directorship positions without regard to the de facto control laws, directors other than Mr. Crouch did not have the governance stature of power to reject his will anytime he wished to impose it as the sole source of funding for NMTV, and the claim of more than 50% ownership by virtue of the other directors was a sham, also requiring the ultimate penalty of denial of license.

6. No interpretation of any law, rule, policy, adjudication, application form or other agency document could conceivably sanction the course of conduct engaged in by Mr. Crouch and Trinity-NMTV that was revealed on the record of this proceeding.

II.

Trinity-NMTV and its counsel indefensibly ignored precedent regarding de facto control laws while claiming to rely on what would have been the first exception to those laws in the approximately sixty years of their existence

7. The comments, at 8, n. 6, rely on the testimony of counsel for Trinity-NMTV that he paid no attention to Note 1 of rule 73.3555 or Commission precedent interpreting that note. The record shows that Trinity's counsel did not research the matter before giving his opinion that the de facto control laws did not apply to what Trinity was doing, nor did he prepare any written opinion on the subject. Initial Decision of Judge Chachkin ("ID") at 332, n. 48.

8. It is fair to say that counsel for Trinity-NMTV was enormously beholden to the client. Counsel began the practice of law in 1980, commencing with the firm Gammon & Grange which then represented Trinity (Tr. 3268, 3372). Counsel left that firm in 1983 to found his own firm taking Trinity-NMTV with him, aided by an advance retainer from Trinity, which became his dominant client, directly and with other clients who were affiliated with and received financial assistance from Trinity (Tr. 3262, 3271, 3421-3430).

9. It is also fair to say that counsel was inexperienced when he represented Trinity-NMTV in his own law firm during the period of time in question. When he left Gammon & Grange in 1983, he had been practicing law for three years; when he advised Trinity-NMTV regarding the phantom exception to the de facto control laws in 1985-1986, he had been practicing law for five-

six years (Tr. 3372). Counsel for Trinity-NMTV was unaware of the landmark Commission decision in 1978 denying renewal of the license held by the prestigious University of Pennsylvania for allowing unapproved parties to control its radio station. The Trustees of the University of Pennsylvania (WXPB), 69 FCC2d 1394, 44 RR2d 747 (1978) (Commissioner Lee dissenting) (Tr. 3164-3165). Counsel testified that he thought the de facto control regulation, Note 1 of Section 73.3555, may have been adopted subsequent to the 1985-1986 time period (Tr. 3219).

10. In the paragraphs that follow, we shall provide an analysis of the de facto control laws reflected in Note 1 and related precedent which Trinity-NMTV and its counsel disregarded. This analysis starts with the inception of the laws in 1927, continues through the 1985-1986 time frame when Trinity and its counsel purportedly relied on a mythical exception to the de facto control laws, and continuing on to May 1991, when a petition to deny was filed against Trinity-NMTV's application to acquire a full power television station in Wilmington, Delaware, at which point in time at least some corrective action was first initiated. Even then, it took two Commission letters to drag out sufficient preliminary facts sufficient for the agency to evaluate the matter and arrive at the decision to designate the hearing on the qualifications of Trinity-NMTV to be a licensee. ID at ¶329, n. 47.

A.

Origins and early decisions leading to
adoption of the de facto control regulation

11. The de facto control part of the multiple ownership regulations provides as follows:

The word "control" as used herein is not limited to majority stock ownership, but includes actual working control in whatever manner exercised.

47 C.F.R. §73.3555, Note 1.

12. The genesis of this provision lies in Section 12 of the Radio Act of 1927 governing the Federal Radio Commission, Sen. Rep., 73rd Cong., 2d Sess. (1934) at 24, 48-49, which was restated in the Communications Act of 1934, as follows:

No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby.

47 U.S.C. §310(d).³ These statutes reflect an unbroken national communications policy -- that parties who control the broadcasting airways must be approved by the appropriate federal agency -- which has been on the books for the past 69 years and still counting.

13. In 1935, the Commission denied an application because the licensee had granted a "power of attorney" over station operations to a party which had not been presented to the agency

³ For many years, this provision, now in subsection (d), was in subsection (b), and earlier precedent refer to Section 310(b).

for approval for the license. U.S. Broadcasting Corporation (WARD), 2 FCC 208, 227.

14. In 1937, the Court of Appeals addressed the situation where an employer provided funds for a radio station for which his employee filed the FCC application, stating:

It is well known that one of the most powerful and effective methods of control of any business, organization, or institution, and one of the most potent causes of involuntary assignment of its interests, is the control of its finances. By establishing a high enough standard of financial qualification, the Commission can eliminate many of the hazards of such control, direct or indirect in character. It is in the public interest that it should not be impeded in a reasonable exercise of its discretion. The public interest in this respect far outweighs the private interest of any individual applicant.

Heitmeyer v. FCC, 95 F.2d 91, 98 (D.C.Cir. 1937).

15. In 1939, the Commission held that a licensee could not delegate control of "management" of a station to a party which had not been presented to the Commission for approval for the station license. Radio Enterprises, Inc., 7 FCC 169, 174-175.

16. In 1940, the Commission held that a licensee could not delegate to its "sole agent" responsibility for station operation, which party had not been presented to the Commission for approval for the station license. Westinghouse Electric and Manufacturing Co., 8 FCC 195.

17. Also in 1940, the Commission promulgated its first set of regulations governing broadcast stations. Rules Governing Standard and High Frequency Broadcast Stations, 5 F.R. 2382. These rules limited the number of high frequency broadcast stations that may be owned, operated or controlled by the same

party to six, §3.228, and promulgated the de facto control regulation, in the form set forth in ¶11, that has remained without change to this day. 5 F.R. at 2384, n. 6.⁴

B.

De facto adjudications reflect the need for full information concerning the facts and circumstances (examples 1940-1953)

18. In 1942, the Commission held, on the particular facts of the case, that a licensee could not vest full authority to operate the station in a general manager who would keep station profits and be responsible for station losses, which party had not been presented to the Commission for approval for the station license. Federated Publications, Inc., 9 FCC 150.

19. In 1943, the Commission held, on the particular facts of the case, that a licensee could not grant actual control over the operation, while purporting to retain control, to a party which had not been presented to the Commission for approval for the station license. Georgia School of Technology, 10 FCC 110, 120-121. This case involved a non-stock licensee, a division of the University of Georgia System.

20. In 1949, the Commission held, on the particular facts of the case, that the licensee should have sought Commission approval of a transfer question before allowing another party to advance large sums of money and control the bank account from

⁴ In 1941, the Commission promulgated multiple ownership regulations for television (limiting the number to three), 6 FR 2284, and in 1943, the Commission promulgated further multiple ownership regulations for AM, 8 FR 16065. In each instance, the regulation contained the same de facto control provision, 6 FR at 2284, n. 2, and 8 FR at 16065, second footnote.

which funds were disbursed. Station WTVJ, 4 RR 1089, 1096-1098.

21. In 1951, the Commission held, on the particular facts of the case, that a 33% stockholder in fact dominated management of the station, and thus had acquired de facto control in violation of the statute, even though other parties owned more than 50% of the stock. The Commission stated:

In passing upon questions of whether control of corporations subject to the Communications Act has been transferred or acquired, the Commission is not bound by any exact formula. Indeed, the Communications Act itself does not spell out a formula which shall govern in such cases. The ascertainment of control in most instances must of necessity transcend formal considerations, for it involves an issue of fact which must be resolved by the special circumstances presented. While it is recognized as basic that a stockholding of record in excess of fifty percent in any corporate entity carries with it the legal right of control as among the stockholders involved, for purposes of administering Section 310(b) of the Act the Commission will not accept as a conclusive presumption that the record holder of such stock is in reality the controlling party or the dominating influence in the corporate business. Similarly, in passing upon the issue of whether a particular individual holding only a minority stock interest of record in a corporation may be in actual control thereof, while we regard his minority interest as an important element in our determination of the issue, we are governed chiefly by the demonstration of his power to dominate the management of the corporate affairs. [emphasis supplied]

Benjamin L. Dubb, et al (Western Gateway Broadcasting Corp.), 16 FCC 274, 288-289, 6 RR 1325 (§3 of Concl.).

22. In 1953, the Commission, on the particular facts of the case, held that Paramount Pictures, while holding a minor interest in the stock of Allen B. DuMont Laboratories, Inc., had taken a major role in the affairs of the company, having power to dominate it, and thus had control of the DuMont broadcast licenses under Section 310. ABC-Paramount Merger Case, 17 FCC

264, 8 RR 541.

C.

Reaffirmation of de facto control regulation in 1953

23. In 1953, the Commission amended its multiple ownership regulations to, among other things, increase the limit on the number of stations to seven for AM, seven for FM and five for TV.⁵ The de facto control regulation was carried forward intact as before, i.e., §3.35 for AM, n. 1; §3.240 for FM, n. 3; §3.636 for TV, n. 5. Amendment of Sections 3.35, etc., 18 FCC 288, 295-296.

D.

De facto adjudications reflect the need for full information concerning the facts and circumstances (examples 1953 to 1978)

24. In 1962, the Commission, on the particular facts of the case, held that unlawful control passed to a general manager, who had played a personal role in the finances of the station including purchases of equipment, hiring and paying salaries of employees, and providing his own management services without compensation, while the FCC approved-stockholders had taken a limited role in station affairs. WDUL Television Corp., 33 FCC 149, 22 RR 545.

25. In 1965, the Court of Appeals affirmed a decision by the Commission, on the particular facts of the case, that unauthorized control rested in a party who provided all of the funds for the station, maintained control of the checkbook and

⁵ Subsequently amended to limit the total number of TV stations to seven, no more than five of which could be VHF stations.

all payments, structured the board of directors so that he had control, and effectively directed the affairs of the corporation. Lorain Journal Co. v. FCC, 351 F.2d 824 (D.C.Cir. 1965), cert. denied, 383 U.S. 967, rehearing denied, 384 U.S. 947 (1966).

26. In 1966, the Commission, on the particular facts of the case, denied an application for violation of the de facto control laws based on evidence of hiring or discharging and paying employees, and influencing programming operations, by a party whose qualifications had not been approved by the Commission for the station. Edina Corp., 7 RR2d 767 (1966).

27. In 1969, the Commission held that the key element in determining actual control is the power to dominate the management of corporate affairs, and, on the particular facts of the case, ruled that a change in actual control had taken place by the replacement of a deceased president of the corporation with another person. WHDH, Inc., 17 FCC2d 856, 16 RR2d 185 (¶17), affirmed sub nom. Greater Boston Television Corporation v. FCC, 444 F.2d 841 (D.C.Cir. 1970), cert. denied, 403 U.S. 903 (1971).

28. In 1975, the Commission designated a de facto control issue based on the particular facts of the case arising from a management contract granting full control to an unapproved party, reaffirming its statement in the 1951 Gateway opinion, ¶21, supra, stating:

The ascertainment of control in most instances must of necessity transcend formulas, for it involves an issue of fact which must be resolved by the special circumstances presented. Therefore, the search for control necessarily

calls for an investigation beyond stock ownership in order to determine effectively where actual control resides.

Stereo Broadcasters, Inc., 55 FCC2d 819 (¶7).

E.

Adjudications applying the fact-oriented
de facto control laws to non-stock licensees
(examples 1978-1983)

29. In 1978, the Commission denied renewal of license of a radio station at the University of Pennsylvania upon a determination that de facto control of programming, personnel and management had been placed in parties who had not been presented to the Commission for approval for the station license. With regard to the fact that a noncommercial (and nonstock) licensee was involved, the Commission stated:

Given the nature of our licensing scheme, all licensees - large and small, commercial or noncommercial - are considered public trustees. As such, the aforementioned principles of accountability and responsibility apply with equal vigor to all licensees. We emphasize that while "[t]he noncommercial broadcast service by definition differs markedly from the commercial service...it is a mistake to regard the noncommercial service as something apart from, and outside of, the basic structure of the Communications Act and Commission policies." [footnotes omitted]

The Trustees of the University of Pennsylvania (WXPN), 69 FCC2d 1394, 44 RR2d 747 (¶13) (1978) (Commissioner Lee dissenting).

30. In 1981, the Commission considered the facts relative to de facto control by the University of Texas over public television stations in Austin licensed to the Southwest Texas Public Broadcasting Council, a nonstock entity, stating in a passage that has since been often quoted or cited in subsequent de facto control cases:

The Commission has recognized many times that there is no

exact formula by which "control" can be determined. The ascertainment of control in most instances must of necessity transcend formulas, since it involves an issue of fact which must be resolved by the special circumstances presented. [citation to Stereo decision, ¶28, supra]. Nevertheless, over the years the courts and the Commission have established certain guidelines. Generally, the principal indicia of control examined to determine whether an unauthorized transfer of control has occurred are control of policies regarding (a) the finances of the station, (b) personnel matters and (c) programming.

Southwest Texas Public Broadcasting Council, 85 FCC2d 713, 49 RR2d 156.

31. In 1983, the Commission applied the de facto control test to a nonstock church entity and, on the particular facts of the case, held that there was insufficient evidence of control by parties who had not been presented to the Commission for approval for the station license to warrant designation of a hearing issue. Seven Locks Broadcasting Co., 94 FCC2d 899, 54 RR2d 709.

III.

The exception to the de facto control laws, advanced
advanced as an attempted defense of manipulation
of the minority incentives by Trinity-NMTV,
is a myth

32. Such was the state of the de facto control laws when Trinity-NMTV commenced its manipulation of the minority incentives.

A.

Lottery legislation and FCC regulations and forms
regarding minority preferences for low power TV/translator
licenses are based on the premise that minority preference
certifications will reflect the real parties in interest

33. In 1992, Congress amended the Communications Act to provide for a lottery mechanism for awarding LPTV and translator authorizations with a provision for upgrading the chances for

selection of a party having a minority background or a party without other broadcast interests. In so doing, Congress made clear that a meaningful increase in such minority and other participation in broadcasting was intended. The statutory language, like that in Section 310(d), speaks in terms of "control":

To further diversify the ownership of the media of mass communications, an additional significant preference shall be granted to any applicant controlled by a member or members of a minority group.

Public Law 97-259 - September 13, 1982, 96 Stat. 1087, codified in 47 U.S.C. §309(i)(3)(A).

34. The Conference Report discussed the need for increasing minority participation as well as awarding a preference for parties who did not have other media interests at some length and was abundantly clear that meaningful participation was intended.

H.R. Rep. No. 795, 97th Cong., 2d Sess. (1982) at 41-46. For example:

With respect to both the media ownership and minority ownership preferences, the Conferees expect that the Commission shall evaluate ownership in terms of the beneficial owners of the corporation, or the partners in the case of a partnership. Similarly, trusts will be evaluated in terms of the identity of the beneficiary.

Id. at 45. This passage is followed by:

The Conferees expect that the preferences which will be awarded in the administration of a lottery will result in a real and substantial increase in the diversity of ownership in the media of mass communications and consequent diversification of media viewpoints. [emphasis supplied]

Id. at 45.

35. The conference report directed the Commission to guard

against quick transfers of licenses won in the lottery "...to help ensure that the very purposes sought to be achieved by the preference scheme be fulfilled..." and it stated:

...the Commission should require that the applicant that is actually awarded the license certifies that they have not entered into any agreement, explicit or implicit, to transfer to another party after a period of time any station construction permit or license awarded.

Id. at 45-46.

36. The Commission understood the clear import of the will of Congress to guard against perversions of a real and meaningful preference for minorities and parties without other broadcasting interests, stating:

All applicants should be aware that improper preference claims violate Federal law. 18 U.S.C. §1001. Additionally, evidence of such claims could place in jeopardy all Commission authorizations then held by the wrongdoer, as well as adversely affecting the grant of any further authorizations.

Lottery Selection Among Applicants, 93 FCC2d 952, 53 RR2d 1401 (1983) (§43).

37. As directed in the Conference Report, the Commission modified the LPTV and translator application form to require what it called a "Real Party in Interest Certification" in which lottery parties certify "that the applicant is the real party in interest and that no agreement, either explicit or implicit, has been made to transfer or assign the license at a later date to any other party." Id. at §55. The application form, as actually changed and signed by NMTV, captioned the certification "REAL PARTY IN INTEREST CERTIFICATION" and in lower case stated "The applicant certifies that no agreement, either explicit or

implicit, has been entered into for the purposes of transferring or assigning to another party, any station construction permit or license or interest therein that is awarded as a result of a random selection or lottery." [emphasis supplied]. TBF Exhibit 105, Tabs I and H.

38. In response to comments proposing that applicants document the basis for their certifications, the Commission repeated the responsibility to submit true and correct real-party-in-interest certifications:

To require that all applicants submit the specific factual information underlying their certifications, as proposed by such parties as Youth News, would impose a mammoth paperwork burden upon applicants and the Commission, without balancing public interest benefit. Applicants who submit false information will, as we have indicated above with regard to preference claims, be subject to substantial penalties.

Lottery Selection Among Applicants, *supra*, at ¶52.

39. Trinity-NMTV filed 25 low power television/translator applications making this certification to the effect that NMTV was minority-controlled and that NMTV had no other broadcast holdings. ID at ¶39; testimony of counsel for Trinity-NMTV, TBN Ex. 105 at 11 and Tab K. Both advanced Trinity-NMTV's chances in the lottery. Both were enormous falsehoods.

B.

Continuation of the de facto control regulation
in multiple ownership rule changes in 1984

40. In 1984, the Commission amended its multiple ownership rules to, among other things, increase the station limits from seven to 12, in each instance relative to AM, FM and TV.

Multiple Ownership (Seven Stations Rule), 56 RR2d 859. By this

time, the separate regulations for AM, FM and TV had been consolidated into rule 73.3555. The de facto control provision of the regulations, Note 1, was carried forward without change.

C.

Continuation of the de facto control regulation
in multiple ownership rule changes in 1985
(the alleged source of the mythical
de facto control exception for minorities)

41. In 1985, the Commission further amended its multiple ownership rules to increase the TV station limits from 12 to 14 if the two additional stations are minority-controlled. Multiple Ownership (12-12-12 Reconsideration), 100 FCC2d 74, 57 RR2d 966. This is the action which Trinity and its counsel rely on for the myth that an exception was made to the de facto control laws. Given the unbroken line of adherence to those laws, then dating back 58 years to 1927, given the unbroken de facto control regulation, then dating back 45 years to 1940, which had just been carried forward under the rule change the year before in 1984 and was again carried forward in the 1985 rule changes in question, in order for a unique and precedent-setting exception to all of that history implementing national policy relative to FCC approval of parties entrusted with broadcast licenses, it would have been necessary for the Commission to speak explicitly with the force of an anti-tank missile.

42. Some exception. The revised rule provided that the two additional full power television stations in which parties owning 12 stations could make investments must be "minority controlled." The Commission defined "minority controlled" as "more than 50%

owned" by minorities. The Commission continued the de facto control regulation which applies to the entire rule 73.3555 and stated that the word "control" is not limited to stock ownership, but includes actual working control in whatever manner exercised.

43. A harmonious reading of these provisions, which the laws of construction prefer (§§104-109 infra), is that "minority controlled" requires minority ownership of more than 50% of the licensee and that such ownership is not limited to naked legal ownership, but contemplates working control as well -- as it always has. The text of the Commission's report and order summarizing the rule change it was adopting bears out this harmonious reading of the regulation in its entirety:

While our multiple ownership rules are not the primary vehicle by which we effectuate our policy to promote minority participation in the broadcast industry, we believe it appropriate to take cognizance of this policy by adopting rules which encourage minority ownership. Accordingly, we will increase to 14 the numerical station ownership limitation for persons acquiring cognizable interests in such minority owned and controlled broadcast stations. [emphasis supplied]

Multiple Ownership (12-12-12 Reconsideration), supra, at ¶53.

44. Trinity's theory rests upon a sentence in a dissenting opinion (by Commissioner Patrick that minorities need not have any role in station programming or operations) that was out of sync with the Section 310 regulatory program -- before, during and after rule change. The notion that owners of a majority of the licensee's stock may abdicate complete control of the operation of their station is the antithesis of all that had gone before under Section 310 and the de facto control regulation.